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No. 83-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ISIDORE BROWN, ROGER O. BROWN, JULES DASHOW,
WALTER Y. ELISHA, NORMAN M. GOLD,
JERROLD N. FINE, BURTON I. KOFFMAN,
ANTHONY M. TORTORIELLO, HUGO UYTERHOEVEN,
WALLACE J. STENHOUSE, JR., DONALD J. CLARKIN,
STANTON I. SUBECK, JOHN W. MULDOON and
MICHAEL L. MEYER,

Petitioners,

v.

JAMES W. SCHACHT, AS ACTING
DIRECTOR OF INSURANCE OF THE
STATE OF ILLINOIS AND LIQUIDATOR
OF RESERVE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondent.

REPLY BRIEF FOR PETITIONERS

The Petition for A Writ of Certiorari should be granted.¹

1. Schacht makes no serious effort to dispute that the Seventh Circuit's interpretation of RICO will extend federal jurisdiction to virtually any claim of common law fraud accompanied by two mailings and will permit recovery of treble damages for securities fraud. Schacht concedes that the specific conduct of which he complains is "overstatement of reserves and falsification of financial statements, fake reinsurance, illegal dividends and systematic looting." If dissemination of purportedly false financial statements and distribution of illegal dividends is, as Schacht asserts, "the

¹The statement required by Rule 28.1 appears at page ii of the Petition for A Writ of Certiorari.

stuff of which civil RICO is made" (Opp. at 7),² the decision below will indeed, as the panel predicted, have a dramatic and untoward effect on the federal judiciary. (App. at 36a.) For that reason alone, this Court should grant certiorari and decide whether Congress intended RICO to extend federal jurisdiction over state law claims and to re-write the federal securities laws.

2. Schacht concedes that RICO's broad language invites exploitation by private litigants for whom the statute was never intended. However, he urges that the victims of unfounded RICO claims are adequately protected by the Federal Rules of Civil Procedure, "discovery rules and summary judgment procedures." (Opp. at 10.) Discovery rules and summary judgment procedures are not an appropriate substitute for construction of a statute to ensure that a potent private remedy is confined to those purposes for which Congress intended it. This Court has not abandoned that function when confronted with questions regarding the scope of private remedies under the federal securities laws or anti-trust laws. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). RICO's civil provisions present questions of greater consequence to private litigants than the questions addressed in those cases.

3. Schacht asserts that the opinion below is consistent with decisions of other Courts of Appeals, which have uniformly rejected all limitations on standing to sue under RICO (Opp. at 14-15). That assertion incorrectly represents the decisions of those courts. The Sixth Circuit, in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), concluded that a prior criminal conviction is not a prerequisite to civil liability under RICO, but the court did not address any question concerning limitations on standing to

²"Opp." refers to Respondent Schacht's Brief in Opposition to the Petition for Certiorari.

sue by private plaintiffs. *Id.* at 95 n.1. Similarly, the sole issue addressed by the Eleventh Circuit in *Morosani v. First National Bank*, 703 F.2d 1220 (11th Cir. 1983), was whether conduct not traditionally subject to criminal prosecution could constitute a predicate act of racketeering. In *Moss v. Morgan Stanley, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,478 at 96,750 (2d Cir. Sept. 9, 1983), the Second Circuit noted the decisions of "a growing number of courts that have limited standing under 18 U.S.C. § 1964(c) to those 'plaintiffs alleging something more, or different than direct injury resulting from the predicate acts that constitute the racketeering activity.'" *Id.* at 96,761-3 n.16, citing *Johnsen v. Rogers*, 551 F. Supp. 281, 284-85 (C.D. Cal. 1982). The panel in *Moss* declined to address that issue. Subsequently, however, in *Trane Co. v. O'Connor Securities*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,502 at 96,921 (2d Cir. Sept. 19, 1983), the Second Circuit expressed "... doubts as to the propriety of private party injunctive relief [under RICO], especially in a case of this nature alleging at most ... garden-variety securities law violations as predicates for the RICO violations." *Id.* at 96,923.

CONCLUSION

The decision of the Seventh Circuit, if permitted to stand, will sanction the use of RICO's powerful treble damage provision in a manner never intended by Congress. Petitioners urge this Court to grant certiorari and review the decision below.

Respectfully submitted,

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